ABDUL RAHIM SHARIFF

v.

MUSTAFFA JUNID & ANOR.

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[ORIGINATING SUMMONS NO. 31-281-84]
8 FEBRUARY 1992

CONSTITUTIONAL LAW: *Natural justice - Service - Whether personally made.*

LAND LAW: *Caveats - Failure to lodge - Indefeasibility - Setting aside of caveats - Pre-existing interest - Meaning of.*

In the originating summons, the plaintiff prayed for the following orders:

(a) A declaration that the order dated 23 July 1981 and made by the Commissioner of Land Titles, Penang in respect of the property known as Holding No. 252, Sek. 2, Bandar Butterworth is null and void.

(b) That the Registrar of Land Titles, Penang do delete and expunge all entries relating to the said order in the interim Register at the Penang Land office under Holding No. 252, Sek. 2, Bandar Butterworth.

Learned Counsel for the plaintiff argued that the Deputy Commissioner had exceeded her jurisdiction by entertaining the claim made by defendant 1 and making the order because defendant 1 had no claim to any pre-existing interest in the said land as he was not the administrator of his late father's estate.

Secondly, learned Counsel for the plaintiff argued that there was a breach of natural justice because Form F was not personally served on the plaintiff.

Another issue for the determination of the Court was with regards to the failure of the plaintiff to present a caveat in pursuance to defendant 2's action in causing Form 1 to be published inviting any person claiming interest to present a caveat within 6 months. Such a failure is to be considered *vis a vis* the fact that a caveat was filed by one Adnan b. Osman to bind his wife Che Norain's 1/3 undivided share which was still in existence.

Held:

[1] Since defendant 1 is not an administrator of his father's estate, he could not make a claim on behalf of his late father's estate. Defendant 1 had no right to present a claim under s. 53. As a consequence, his claim should not have been entertained and the inquiry and the order was void.

[2] Based on the circumstances, the Commissioner cannot be faulted for not serving Form F on the plaintiff. This ground therefore fails.

[3] Since the order of the Deputy Commissioner is null and void, the provisions of s. 340 (2)(c) of the National Land Code is applicable, and the title obtained by defendant 1's father is not indefeasible and may be set aside.

[Prayers (a) & (b) of plaintiff's application allowed. Parties to pay own costs.]

Cases referred to:
Loh Koon Moy v. Zaibun binti Syed Ahmad [1978] 2 MLJ 29 ***(foll)***
Comptroller of Income Tax v. Yan Tai Min [1965] MLJ 255 ***(foll)***
Ang Hoi Yin v. Sim Sie Hau [1969] 2 MLJ 3 ***(cit)***

Legislation referred to:
National Land Code (Penang and Malacca Titles) Act 1963, ss. 4, 15, 21, 53(1)(a), (3), 54
National Land Code 1965, ss. 340(2)(c), 346, 418

Other source referred to:
Principles of Equity, Snell's, 28th Edn., p. 313

For the plaintiff - Mohideen Abdul Kader M/s. Mohideen & Asamaley
For the defendant - S.P. Annam M/s. Annamalai & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

As the facts of this case are rather complicated I shall state them in chronological order.

23 November 1943	- The land was purchased by Yahya bin Mat, Che Emboon bt. Yahya and Cik Noorain bt. Yahaya.
19 March 1948	- The land was sold to Mohamed Junid bin Haji Mohd. Noor - D1's father.
3 January 1954	- Yahya died, survived by his wife Emboon and 2 sons Abdul Rahman (plaintiff) and Ishak.
31 January 1962	- Noorain died, survived by her husband (Adnan bin Osman) and daughter Norzila bt. Adnan.
10 April 1966	- Emboon died, survived by two sons Abdul Rahman (plaintiff) and Ishak.
28 June 1979	- Mustaffa (D1) presented a claim under s. 53(1) of the National Land Code (Penang and Malacca Titles) Act 1963 stating that his father (Mohamed Junid) had a pre-existing interest in the land pursuant to the agreement dated 19 March 1948.
10 June 1980	- Abdul Rahman (plaintiff) and brother Ishak obtained letters of administration in respect of Emboon's (their mother's) estate. (But it was extracted on 2 December 1981).
18 June 1980	- The Timbalan Pesuruhjaya Hakmilik Tanah Pulau Pinang (Deputy Commissioner) issued notice in Form F. It was addressed to 9 persons including D1, and the 3 original owners (all deceased by then). This notice was not served on the plaintiff personally.
3 July 1980	- Form F was published in Penang Government *Gazette* No. 487 and also displayed on public notice boards.
14 October 1980	- Inquiry held under s. 54 National Land Code (Penang and Malacca Titles) Act 1963 in the absence of the plaintiff.
23 January 1980	- The Deputy Commissioner made an order vesting the land in the name of Mohamad Junid (D1's father).

12 February 1981	- Order dated 23 January 1981 was gazetted.
2 December 1981	- Letters of administration obtained on 10 June 1980 by plaintiff and Ishak was issued.
20 April 1981	- Adnan bin Osman filed a caveat to bind 1/3 undivided share of his wife Che Noorain bt. Yahaya on the said land.
2 January 1981	- Plaintiff and brother Ishak obtained letters of administration in respect of estate of their father Yahaya bin Mat.
22 February 1981	- Letters of administration granted on 23 January 1982 issued to plaintiff and Ishak.
2 June 1983 and 11 July 1983	- Plaintiff's solicitors requested D2 to review the order made on 23 January 1982 pursuant to s. 21 National Land Code (Penang and Malacca Titles) Act 1963 - refused.
4 May 1984	- Plaintiff filed this originating summons.
27 September 1984	- Form I published in Penang Government *Gazette* No. 850, *inter alia*, inviting any person claiming any interest to present a caveat within 6 months, failing which the title became indefeasible.
26 March 1985	- Title became indefeasible.
28 June 1985	- Grant first grade issued in the name of Mohamed Junid (D1's father)

In this originating summons, the plaintiff prayed for the following orders:

(a) A declaration that the order dated 23 January 1981 and made by the Commissioner of Land Titles, Penang in respect of the property known as Holding No. 252, sek. 2, Bandar Butterworth is null and void.

(b) That the Registrar of Land Titles, Penang do delete and expunge all entries relating to the said order in the Interim Register at the Penang Land Office under Holding No. 252 sek. 2, Bandar Butterworth.

(c) Costs.

Let me, first of all, dispose off the points raised by learned Counsel for D1. First, he said that the plaintiff had no *locus standi* to commence this proceedings because he submitted that the plaintiff sued in his personal capacity.

On this issue, I agree with the submission of learned Counsel for the plaintiff, that the plaintiff actually commenced this action in his capacity as an administrator of the estate of Che Emboon and Yahaya (his parents). This is clear from para. 1 of the affidavit sworn by him and filed in support of the originating summons. The grants of letters of administration were also exhibited.

I also agree that the omission to show such capacity is only an irregularity which can be cured by an amendment - see *Loh Koon Moy v. Zaibun binti Syed Ahmad* [1978] 2 MLJ 29

Secondly, learned Counsel for D1 also said that D1 should not be sued, because the subject land is now registered in the name of his father, not him, and D1 is sued in his personal capacity, not as a legal representative of his father's estate.

Again, I think there is no merit in this objection at all. D1 was the person who presented the claim under Form E for replacement title to be issued in his father's name. There can be no doubt that he wanted to inherit his share of the land. He attended the inquiry and produced evidence to support his claim. He was the central figure in the whole thing. I think it is only proper that he is made a party.

Thirdly, learned Counsel for D1 said that the plaintiff was only an administrator of the estate of Yahaya and Emboon, but not of Che Noorain, therefore he has no *locus standi* to sue

I do not think there is merit in this argument. Yahaya and Emboon were co-owners with Che Noorain, each had 1/3 undivided share. The order made by the Deputy Commissioner affected Yahaya's and Emboon's shares. The plaintiff was one of the administrators of Yahaya's and Emboon's estate.

Fourthly, learned Counsel for the defendant argued that this application was "statute barred". He said that the plaintiff ought to have appealed within 3 months of the refusal by the Commissioner to review the order. He referred to s. 418 of the National Land Code.

I do not think there is merit in this argument. First it should be noted that s. 15 of the National Land Code (Penang and Malacca Titles) Act 1963 which is applicable, provides that any person who is aggrieved by any decision given by the Commissioner may appeal to the Land Titles Appeal Board within one month from the date the decision was made. In this case the plaintiff was not aware of the claim made by D1 and was not aware of the inquiry. He only came to know of the order four months after it was made, by which time the period of appeal had expired. The question that the plaintiff should have appealed does not arise. The plaintiff is asking for a declaration. The question that he is statute barred does not arise.

Let me now deal with the main grounds for this application.

The first ground put forward by learned Counsel for the plaintiff is that the Deputy Commissioner had exceeded her jurisdiction by entertaining the claim made by D1 and making the order because D1 had no claim to any pre-existing interest in the said land. This is because, it was his late father who had the pre-existing interest by virtue of the agreement. He argued that D1 himself had no pre-existing interest because, at the material time, he was **not** the administrator of his late father's estate.

Section 53(1)(a) of the Act provides -

> 53(1) Any Person claiming:
>
> (a) that immediately before the appointed day he had any pre-existing interest in any holding in respect of which no corresponding replacement title or interest is entered in the Interim register; or
>
> (b) ...
>
> may present to the Commissioner a claim in respect thereof in Form E.

The term "pre-existing interest" is defined in s. 4 of the Act as follows:

> "Pre-existing interests" means all interests, rights, titles and estates (not being interests, rights, titles or estates vested in the Governor or the Government of the State) subsisting immediately before the appointed day in any land in the State, including any title therein acquired by adverse possession or operation of law or under any unregistered pre-existing deed;

"interest" is defined as follows:

> "interest" in relation to land means any interest in land recognised as such by law, and includes an estate in land;

I have no doubt that Mohamed Junid, D1's father, by virtue of the agreement, is a person having "pre-existing interest". But the question is whether his son, who was not an administrator of his estate is also a person having "pre-existing interest".

I am of the view that D1 does not have an "interest in relation to land" because I do not think merely by being a son of his late father, it can be said that he had an interest "recognised as such by law". Being a son alone, does not automatically mean he has an interest "recognised as such by law" over his father's estate. He can only have such an interest if he is an administrator. Until he is appointed administrator, he does not have an "interest recognised as such by law".

In *Snell's Principles of Equity* 28th Edn., at p. 313, the learned author says:

> An Administrator, on the other hand, derives his title solely from the grant of letters of administration and has no powers before the grant is made.

In *Comptroller of Income Tax v. Yan Tai Min* [1965] MLJ 255, Ali J held that it was only on extracting the grant of a letter of administration that a person can be said to be duly clothed with a representative character to have acquired a title to the estate. See also *Ang Hoi Yin v. Sim Sie Hau* [1969] 2 MLJ 3.

For this reason, I am of the view that he had no right to present a claim under s. 53. It follows that his claim, should not have been entertained, and the inquiry and the order are void.

Learned Counsel for D1 argued that the substance of the claim by D1 was that **his father** had a pre-existing interest in the said land. But, if he is not an administrator of his father's estate, how could he make the claim on behalf of his late father's estate?

The second ground put forward by the learned Counsel for the plaintiff was that there was a breach of natural justice. This is because Form F was not personally served on the plaintiff.

It should be noted that Form F was addressed to the 3 deceased persons, Yahaya, Emboon and Cik Noorain besides D1 and 5 other persons. It was published in the Government *Gazette* and displayed at public notice boards.

Section 53(3) requires the Commissioner to serve the notice of claim on all persons **to his knowledge** affected thereby.

It is also clear that the letters of administration obtained by the plaintiff and his brother Ishak were issued **after** Form F was gazetted, indeed **after** the vesting order was made. It is also not denied that the plaintiff did not take any step to register himself and his brother Ishak as personal representatives of Yahaya and Emboon under s. 346 of the National Land Code. In the circumstances the Commissioner cannot be expected to look beyond the register to know whether there were other people who would be "affected" by the claim and serve Form F on them. In the circumstances I do not think the Commissioner can be faulted for not serving Form F on the plaintiff. This ground therefore fails.

However, there is one more point to be decided.

After this proceeding was commenced, D2 caused Form I to be published inviting any person claiming interests to present a caveat within 6 months. The plaintiff did not present any caveat. (However a caveat filed by Adnan bin Osman to bind his wife Che Noorain's 1/3 undivided share was still in existence).

Subsequently the title "became indefeasible" and Grant First Grade was issued to D1 on 28 June 1985.

What is the effect of the failure of the plaintiff to present a caveat and the title "becoming indefeasible?"

The first thing that should be noted is that this is not a case where the title had become indefeasible long before a claim is made. This is a case where the proceeding in Court to challenge the order giving title had already been commenced before the title eventually became indefeasible To say that since the title has now become indefeasible and therefore cannot be challenged anymore would mean that the plaintiff is robbed of his remedy before the matter is adjudicated by the Court. I do not think that is right.

Furthermore, as I am of the view that order of the Deputy Commissioner is null and void, the provisions of s. 340(2)(c) of the National Land Code is applicable, and the title obtained by D1's father is not indefeasible and may be set aside.

The caveat filed by Adnan bin Osman to bind Che Noorain's 1/3 share was still in existence when the title was made "indefeasible".

I allow this application as per prayers (a) and (b), on the ground that D1 was not a person having "pre-existing interest" in the land in question and therefore could not have made a claim under s. 53(1) of the Act and, therefore, the order made by the Commissioner in respect of the land on 23 January 1981 is null and void.

However, in the circumstances of the case, I am of the view that each party should pay his own costs.

Also found at [1992] 3 CLJ 1389